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No. 88-428

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, *ET AL.*,

*PETITIONERS,*

V.

CENTER FOR ENVIRONMENTAL EDUCATION, *ET AL.*,

*RESPONDENTS.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF OF RESPONDENTS CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In light of Congress' recent amendments to the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.* (1982 & Supp. IV), which specifically address the ruling of the court of appeals below, should this Court grant certiorari in this case?

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Center for Environmental Education, Greenpeace, U.S.A., Humane Society of the United States, Sierra Club, The Whale Center, Animal Protection Institute, and Society for Animal Protective Legislation respectfully request the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Kokechik Fishermen's*

*Association, et al. v. Secretary of Commerce, et al.*, 839 F.2d 795 (D.C. Cir. 1988) (App. 1a-31a).[1]

## RESPONDENTS' STATEMENT OF THE CASE

This case involves the proper application of the requirements of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, *et al.* (1982 & Supp. IV), to a factory-ship drift gillnet industry operated by a Japanese fishing association (the Federation) in the waters of the North Pacific Ocean and the Bering Sea off the coast of Alaska. The Federation fleet utilizes a system of motherships and catcherboats to harvest salmon on the high seas and within the United States 200-mile Exclusive Economic Zone (EEZ) and ship them to commercial markets in Japan. (App. 8a, 40a-41a) However, the Federation's driftnets capture more than just salmon in their mesh. Once deployed, they indiscriminately, and unavoidably, entangle thousands of marine mammals as well, including Dall's porpoises, Northern fur seals, and Northern (Stellar) sea lions (App. 9a, 41a), all of which are species protected by the MMPA. 16 U.S.C. § 1361 *et al.*

Many of the entangled marine mammals drown while entrapped in the nets or are seriously injured (App. 9a, 41a). Each entanglement, whether or not the animal is killed, is a "taking" of a marine mammal under the MMPA, 16 U.S.C. § 1362(12), and the Secretary's regulations, 50 C.F.R. § 216.3 (1987). "Takings" are strictly prohibited by the moratorium in the MMPA unless the requirements for an exemption have been met and a general permit has been issued

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[1] "App." refers to the Appendices to the petition for writ of certiorari filed on behalf of the petitioners C. William Verity, Secretary of Commerce, *et al.*. "C.A. App." refers to the Appendix filed below in the Court of Appeals. "Resp. App. refers to the Appendix to Respondents' brief, filed herewith.

by the Secretary (or Congress) authorizing the taking. 16 U.S.C. §§ 1371-74.

The Federation's salmon gillnet fleet is allowed to operate within the U.S. 200-mile zone only by permission of the United States government according to the terms of the International Convention for the High Seas Fisheries of the North Pacific Ocean (INPFC), 4 U.S.T. 380, T.I.A.S. No. 2786, an international treaty between the United States and Japan. In 1978, the INPFC was amended to make the Federation's operations within the 200-mile zone fully subject to United States laws governing the taking of marine mammals incidental to fishing operations. 30 U.S.T. 1095, T.I.A.S. No. 9242. The controlling United States law regulating the taking of marine mammals is, of course, the MMPA. Thus, by international convention agreed to by the Japanese Government, the Federation may not operate within the United States EEZ unless it is in full compliance with the MMPA's requirements. Further, under the INPFC, the Japanese Government is required to ensure that the Federation's vessels adhere to this requirement. *Id. See also* Act of July 28, 1978, Pub. L. No. 95-326, § 14(c), 92 Stat. 405 (1978) (amendment to the North Pacific Fisheries Act making Japanese vessels within the U.S. 200-mile zone subject to the MMPA).

The MMPA is an unusual statute in the extent of protection it affords marine mammals. As its central feature, the MMPA imposes a moratorium on the taking of marine mammals and sets up a series of strict requirements for obtaining an exemption from the moratorium. 16 U.S.C. § 1371(a). A takings permit may be issued by the Secretary only if specific findings regarding the health of the population stocks at issue can be made. 16 U.S.C. §§ 1371-74. The Secretary cannot authorize any takings of a marine mammal species which is below its optimum sustainable population (OSP) and hence

"depleted," as that term is defined in 16 U.S.C. § 1362(1), or of any species for which the Secretary is unable to make affirmative findings that it is above its OSP and hence not depleted. 16 U.S.C. §§ 1362(8), 1371(a)(2), 1371(a)(3), 1373. There is no question that Congress' intent in enacting this moratorium was to end takings of marine mammals which do not satisfy the requirements in the MMPA for an exemption from the moratorium and issuance of a permit. 16 U.S.C. §§ 1362(7), 1371(a); *see* H.R. Rep. No. 707, 92nd Cong., 1st Sess. 1, 15, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4144, 4158.

The MMPA also contains a special section authorizing the issuance of "general permits" for the taking of marine mammals, consistent with the statute and its regulations. 16 U.S.C. § 1374(h)(1). The Secretary has promulgated regulations under this section which allow the issuance of a general permit for takings of marine mammals incidental to commercial fishing operations, based on the gear type used. *See* 50 C.F.R. 216.24(b). A commercial fishery applying for such a permit is required to identify in its permit application the species and numbers of marine mammals "expected" to be taken under the general permit. 50 C.F.R. § 216.24(b)(2)(vi). The Secretary's regulations explicitly provide that "[n]o marine mammals may be taken in the course of a commercial fishing operation unless . . . a general permit and certificate(s) of inclusion have been obtained in accordance with these regulations and such taking is not in violation of such permit, certificate(s), and regulations." 50 C.F.R. § 216.24(a)(1). This general permit was the type of takings permit that the Federation applied for in this case. (App. 5a, 40a)

In addition to enacting the original MMPA in 1972, Congress has carefully followed its progress and has several times enacted amendments to assure that its goals are met. Thus,

for the first three years after the MMPA became applicable to the Federation's operations within the U.S. 200-mile zone (from 1978 until 1981), Congress suspended full application of the MMPA's requirements in order to allow research to be conducted by Japan and the United States to determine the effect of the Japanese salmon fishery on marine mammal species and "to work to reduce or eliminate the incidental catch of marine mammals in the fishery." Act of July 28, 1978, Pub. L. No. 95-326, § 14(a)(3), 92 Stat. 405. Then, as required by statute, the Federation in 1981 applied for and was granted a three-year general permit by the Secretary of Commerce authorizing the taking of 5,500 Dall's porpoises, 450 Northern fur seals, and 25 Northern (Stellar) sea lions. (App. 4a, 39a)

Even at the time that permit was issued, however, Congress was aware of and concerned about the Federation's lack of progress in reducing the level of marine mammal takings during the interim research period from 1978-81. *See* H.R. Rep. No. 228, 97th Cong., 1st Sess. 17-18, ***reprinted in*** 1981 U.S. Code Cong. & Admin. News 1458, 1467-68. These concerns led Congress to take legislative action the very next year. In 1982, Congress amended the North Pacific Fisheries Act of 1954 (NPFA), 16 U.S.C. § 1021, *et seq.*, to rewrite the general permit issued to the Federation by the Secretary in order to hasten achievement of the MMPA's goals.

The new, stricter permit imposed by Congress was specifically aimed at achieving reductions in the marine mammal take level which had so far eluded the Japanese salmon gillnet fleet and requiring the Japanese Government to adequately fund ongoing research on the effect of the fishery on marine mammals. 16 U.S.C. § 1034.[2] As explained by Senator

[2]The permit restrictions added by Congress in the 1982 amendments to the NPFA included a specific timetable for the Federation to implement required new fishing gear designed to reduce marine mammal mortality,

Packwood, one of the primary sponsors of the legislation, "it is time for the . . . kill rate to be reduced." . . . "Encouraging [the Japanese] to do so is the goal of this particular section of the Fisheries Amendments of 1982." 128 Cong. Rec. S14361, S14364 (daily ed. December 10, 1982); *see also* 128 Cong. Rec. H9449, H9451 (daily ed. December 10, 1982).

With the takings permit enacted by Congress in 1982 due to expire on June 9, 1987, 16 U.S.C. § 1034(b), the Federation submitted a new application for a general permit under the MMPA to the Secretary on July 18, 1986. The application listed the species and numbers of marine mammals "expected to be taken" annually: 5,500 Dall's porpoise, 450 Northern fur seals, and 25 Northern (Stellar) sea lions. (App. 5a, 40a) These were the same species and numbers which were included in the 1981 general permit issued by the Secretary and the amended permit enacted into law by Congress in 1982. (App. 4a, 39a)

After extensive administrative hearings and recommended findings by an Administrative Law Judge, the Secretary concluded that he could not make the statutorily required findings regarding the optimum sustainable population (OSP) level for the Northern fur seal and the Northern sea lion. (App. 6a-8a, C.A. App.127-28, 136) In fact, the Secretary found that one population of fur seals taken in the fishery, the Pribilof Island population, was actually depleted. (App. 5a-6a, 13a) Although

16 U.S.C. § 1034(a)(2); a requirement of a Secretarial "action plan" for each year of the permit, which was "to resolve questions about the status and trends of marine mammals affected by the Japanese high seas and land-based salmon gillnet fisheries, and reduce the annual incidental take of marine mammals . . .", 16 U.S.C. § 1034(b)(2); and a requirement that the Japanese Government adequately fund continuing research on marine mammals. 16 U.S.C. § 1034(f). The Secretary was authorized to immediately suspend the general permit issued by Congressional action if he found that the Congressionally required research was not being adequately funded by Japan. 16 U.S.C. § 1034(f)(2).

he was unsure whether the other affected population of fur seals (the Commander Island population) was depleted, the Secretary was unable to make the statutorily required finding that it was at its OSP. (App. 8a, 13a, C.A. App. 136) With respect to the Northern sea lion, the Secretary declined to issue a takings permit "because of a separate agency action to list those stocks as depleted, a determination that precludes issuance of an incidental take permit under the MMPA." (C.A. App. 127)[3]

The record before the Secretary showed that takings of these prohibited species are certain to occur if the Japanese salmon gillnet fishery is allowed to operate. *Kokechik Fishermen's Association v. Secretary of Commerce*, 839 F.2d at 801 (App. 12a, 41a) The Secretary conceded that any takings of marine mammal populations which have not been found to be at OSP are unlawful under the MMPA, and he could not issue a permit to the Federation for those species. *Id.* at 798-99, 801 & n. 13 (App. 8a, 12a-13a)

Nevertheless, the Secretary issued a general permit for the fishery to operate by including in the Federation's general permit only the one species of marine mammal — the Dall's porpoise — for which he could make the required OSP findings. But even as he did so, the Secretary admitted that, if the fishery operated under the permit issued for that one species, it would inevitably entangle fur seals and sea lions in its driftnets right along with the Dall's porpoises. *Kokechik*, 839 F.2d at 801 & n. 13 (App. 12a-13a)

[3]The Secretary has recently taken separate administrative actions regarding the designation of the Pribilof Island fur seal and the Northern sea lion as depleted, based on information which shows dramatic declines in these populations over the past several years. *See* 53 Fed. Reg. 17888 (1988) (designating the fur seal as depleted); 53 Fed. Reg. 16299 (1988) (advance notice of rulemaking proposing to designate the Northern sea lion as depleted).

To get around the fact that his issuance of a general permit to the Federation would result in marine mammal takings which are contrary to the express prohibitions in the MMPA and its implementing regulations, the Secretary rationalized that Congress' purpose in requiring general permits for commercial fisheries/marine mammal interactions was "merely [to] immunize the holders and their members from liability for civil or criminal sanctions under the MMPA." (Fed. Govt. Appeals Court Brief at 12). In other words, the Secretary's main objective in issuing the permit was not to protect marine mammals as the MMPA requires — but rather to make it less expensive for the Federation to take marine mammals illegally.

The district court and the court of appeals both rejected the Secretary's rationale. *Kokechik Fishermen's Association, et al. v. Secretary of Commerce, et al.*, 679 F. Supp. 37 (D.D.C. 1987), *aff'd*, 839 F.2d 795 (D.C. Cir. 1988) (App. 1a-57a) As the court of appeals held, the Secretary's "view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with [the Secretary's] duty because it allows — subject to the civil penalty price — illegal takings of other protected marine mammals." *Kokechik*, 839 F.2d at 802. (App. 14a) The court concluded that "[t]he Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by the Act." *Id.* (App. 14a) It therefore enjoined issuance of a general permit to the Federation's salmon gillnet fleet.[4]

[4]The court of appeals denied the government and the Federation's petitions for rehearing and suggestions for rehearing *en banc* on May 11, 1988. (App. 64a-67a). The Solicitor General and the Federation moved this Court for a stay of the court of appeals ruling pending certiorari on May 31, 1988. Their motions were denied on June 9, 1988. Following this Court's action on the stay requests, the Solicitor General subsequently filed a Petition for Writ of Certiorari, but the Federation did not.

There have been some important supervening developments in Congress since the Solicitor General's petition for certiorari was filed in September. Following the court of appeals' decision on February 16, 1988, both the House of Representatives and the Senate held extensive hearings which considered takings of depleted species of marine mammals by commercial fisheries, the *Kokechik* decision, and its potential implications for the continuing operation of commercial fisheries with marine mammal interactions. As Senator Stevens from Alaska remarked in his opening statement at the hearings in the Senate:

> Possible depletion of northern fur seals and stellar sea lions and the impact of the recent court decision in *Kokechik Fishermen's Association v. Secretary of Commerce* on the ability of the Commerce Department to issue general permits for domestic fishermen is something the next hearing should address. The potential impact of this on the fishing industry could be tremendous.

Hearings on the Reauthorization of the Marine Mammal Protection Act before the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 2d Sess. 6 (April 13 and May 19, 1988) (S. Hrg. No. 711) (hereinafter "1988 Senate Hearings").

The May 19th Senate hearing was devoted entirely to the questions of marine mammal/commercial fisheries interactions and the effect of the *Kokechik* decision. Concern focused on the fact that there were no exemptions in the existing MMPA which would allow general permits for takings of any species found to be depleted or not affirmatively determined by the Secretary to be at its OSP, the situation which the *Kokechik* decision had brought to light. 1988 Senate Hearings at 153-54, 181. As Committee Chairman Senator Breaux summed up the issue facing Congress:

> Under current law, in no case can either a general permit or a small take exemption be issued to a fishery if any of the marine mammal species to be incidentally taken are accorded "depleted" status — that is, that the population is below the OSP level.
>
> Furthermore, very recent judicial determinations of the Act [the *Kokechik* case] confirm that a marine mammal species for which no OSP determination has been made is to be treated as if it were depleted in the context of the general permit considerations.
>
> Virtually all of the significant domestic commercial fisheries from California to Alaska have some interaction with a marine mammal that is depleted, or is soon to be found depleted or for which no OSP determination has yet been made.
>
> For example, I understand that a depletion determination for the northern fur seal has just been issued this week and proceedings are under way for making the same determination for the Steller sea lion in the near future. With the exception of the Dall's porpoise, virtually all other marine mammal species that regularly interact with West Coast fisheries have no OSP determinations.

1988 Senate Hearings at 154-155.

At the House hearings also, the major topic for consideration was the effect of the *Kokechik* decision. As described by Subcommittee Chairman Studds:

> One of the major issues for the reauthorization relates to the incidental take of marine mammals by foreign and domestic fishermen. While the Act prohibits the taking of marine mammals that are considered depleted, the National Marine Fisheries Service may allow for the taking of other marine mam-

> mals if it can be shown that the taking will not diminish their stocks below an optimum level.
>
> Recent judicial decisions have revealed the conflict between marine mammal protection, our own ignorance and the need to fish. Two courts have blocked a permit for the Japanese salmon fishery off Alaska because NMFS was unable to muster the scientific data to demonstrate that the fishery would not harm certain marine mammal populations. Because the Service has made firm population estimates for only a few species of marine mammals, the court action has effectively stalled its permit process.

Reauthorization of the Marine Mammal Protection Act, Hearings on H.R. 4189 before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 100th Cong., 2d Sess. 1-2 (May 10, 1988) (H.R. Hrg. No. 63) (hereinafter "1988 House Hearings").

Nowhere in Congress' review of this case was there any indication that Congress believed the court of appeals had not correctly applied the prohibitions in the MMPA. Nor did Congress even consider taking any action to reverse the court of appeals through legislation. However, both the House and Senate Committees reported out bills with similar language which addressed the issue of commercial fisheries/marine mammals interactions head-on by creating a new "Interim Exemption for Commercial Fisheries," in the 1988 amendments to the MMPA.[5]

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[5]*See* H.R. 4189 and S. 2810, 100th Cong., 2d Sess. (1988). H.R. 4189 passed the House of Representatives on September 26, 1988. 134 Cong. Rec. H8237 (daily ed. September 26, 1988). S.2810 passed the Senate on October 14th. 134 Cong. Rec. S16336 (daily ed. October 14, 1988). The House subsequently concurred in a Senate amendment to H.R. 4189

The Interim Exemption adds a new section (with fifteen detailed subsections) to the MMPA which solves the problem of there being no exemption in the Act to cover fishermen's takings of depleted species and species for which no OSP finding has been made. The Interim Exemption supercedes the existing provisions of the MMPA by providing a five-year special exemption which will allow commercial fisheries to operate until October 1, 1993, without otherwise satisfying the strict requirements of the MMPA for an exemption from the moratorium and issuance of a general permit to take marine mammals. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988) § 114 (to be codified in 16 U.S.C. § 1361 *et seq.*) (hereinafter "1988 MMPA Amendments") (Resp. App. 1a-18a).

This Interim Exemption was enacted directly in response to Congress' understanding that, after the *Kokechik* decision, general permits could not be issued for commercial fisheries which take depleted marine mammal species or where there is inadequate information to make the required OSP findings. As explained in the Senate Committee Report on the legislation:

> As a result of the *Kokechik* litigation and the designation of species as depleted, no new permits for foreign fishing operations have been issued in the last year. In addition, NOAA has indicated that renewal of permits or issuance of new permits to replace those of domestic fishermen which expire at the end of the year will not be possible, under existing provisions of the MMPA. In the absence

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not related to the *Kokechik* case. 134 Cong. Rec. H10506 (daily ed. October 19, 1988), and the Senate concurred in a further House amendment on October 21st, thus enacting H.R. 4189, as amended, on the last day of the Congressional session. 134 Cong. Rec. S17118 (daily ed. Oct. 21 1988).

> of Congressional action, this situation could result in the closing of fisheries in the North Pacific and elsewhere.

S.Rep. No. 592, 100th Cong., 2d Sess. 5 (1988) (hereinafter "1988 Senate Report"); *see also* H.R. Rep. No. 970, 100th Cong., 2d Sess. 18-20 (1988) (hereinafter "1988 House Report").

The Interim Exemption establishes detailed procedures for commercial fisheries to apply for the exemption; it requires reporting of all marine mammals taken by the fisheries and establishment of a federal observer program to conduct on-board data gathering activities; and it provides the Secretary with both emergency and general authority to take action to prevent significant adverse impacts on any marine mammal population. 1988 MMPA Amendments § 114(a),(b),(c),(e), & (g) (Resp. App. 2a-7a, 8a-13a). A separate section of the amendments requires the Secretary to prepare conservation plans for the Northern Fur Seal and the Northern (Stellar) Sea Lion by 1989 and 1990, respectively, for the express purpose of "conserving and restoring the species or stock to its optimum sustainable population." 1988 MMPA Amendments § 115(b)(1),(2). (Resp. App. 18a-20a). Notably, Congress chose to enact § 114 as an interim measure effective only until October 1, 1993. *Id.*, § 114(a). (Resp. App. 2a). The moratorium and prohibitions in the existing MMPA, which gave rise to this case and made the Interim Exemption necessary, were not changed, and, in fact, they were reauthorized by Congress in the very same legislation. 1988 MMPA Amendments § 101, 102, & 104. (Resp. App. 2a, 33a).

While Congress made the Interim Exemption expressly applicable to all affected domestic and foreign commercial fisheries operating pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* (1982 & Supp. IV), it excluded the Japanese drift gillnet fleet

from the exemption.[6] Congress did not take this action without fully considering the effect of its action on the Japanese salmon gillnet fleet. As explained in the House Committee Report accompanying the legislation:

> [T]his interim regime will be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act. *By limiting the exception in this way, the Committee intends that the Japanese salmon gillnet fleet which has been precluded from operation in the U.S. Exclusive Economic Zone by a decision of the U.S. Court of Appeals in Kokechik Fishermen's Association v. Secretary of Commerce will not have the provisions of section 114 available to it. The Committee does not intend to disturb the holding in that case as it applies to the Japanese salmon gillnet fleet.*

1988 House Report at 21 (Emphasis added); *see also* 1988 Senate Report at 16 ("The Committee does not intend that this section [§ 114] affect the result of the [*Kokechik*] litigation, as it applies to the Japanese salmon driftnet fleet.") [7]

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[6]Section 114(a)(1) of the 1988 MMPA Amendments provides:

> During the period beginning on the date of enactment of this section and ending October 1, 1993, . . . the provisions of this section, rather than sections 101, 102, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations *by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act.* (16 U.S.C. § 1824(b)) (Emphasis added). (Resp. App. 2a)

[7]The Senate Committee Report also took note of the fact that the *Kokechik* case was pending before this Court on petition for certiorari. 1988 Senate Report at 16.

The President signed the 1988 MMPA Amendments, which included the Interim Exemption for Commercial Fisheries, into law on November 23, 1988. Pub. L. No. 100-711, 102 Stat. 4755 (1988) (resp. App. 1a-35-a). Thus, the question is whether review by this Court is warranted in light of these recent amendments adopted by Congress.

## REASONS FOR DENYING THE WRIT

In urging this Court to grant certiorari in this case, the Solicitor General attempts to portray the court of appeals ruling as one that departs from the general rule of deference to the agency's interpretation of a statute. The Solicitor argues that the court of appeals erred in finding that the Secretary could not ignore the MMPA's prohibition on takings of fur seals and sea lions or treat marine mammal species in isolation when he issued a general permit to the Federation to operate within the United States' 200-mile zone. However, as the court of appeals correctly recognized, the rule of deference to administrative practice cannot overcome Congress' clear expressions of intent to the contrary in a statute. *Kokechik*, 839 F.2d at 803 (App. 16a); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9 (1984).

Congress spoke plainly on the issue in this case when it enacted the MMPA, a statute which flatly prohibits any marine mammal takings *unless under the authority of an authorized exemption and lawfully issued permit. See* 16 U.S.C. § § 1371-74. Takings without a permit are explicitly barred by the MMPA and the Secretary's implementing regulations. 16 U.S.C. §§ 1371(a), 1372(a); 50 C.F.R. § 216.24. The Federation could not qualify for a permit because it takes depleted species and species for which the Secretary is unable to make the required affirmative findings that they are at their OSP. The Secretary's rationale that the MMPA's permit

requirements are merely for the purpose of decreasing the fishery's liability for civil penalties, rather than protecting marine mammals, facilitates the very evil the MMPA was designed to prevent — illegal takings of marine mammals. The court of appeals correctly interpreted the law and review on certiorari would not likely change that result.

Moreover, Congress spoke very plainly again just recently when it enacted the 1988 MMPA Amendments and provided a detailed new "Interim Exemption for Commercial Fisheries." 1988 MMPA Amendments § 114. (Resp. App. 2a-18a). It did so specifically to address the problem under the existing Act and the *Kokechik* decision of fishermen taking depleted species and species for which no OSP determination has been made. Indeed, the addition of § 114 of the 1988 MMPA Amendments was directly precipitated by the court of appeals decision in *Kokechik*. *See* 1988 House Report at 16-20; 1988 Senate Report at 3-6. Congress knew the Federation could not qualify for a general permit under the existing Act and thus would not be able to operate within the United States 200-mile zone without the Interim Exemption, but, nevertheless, it intentionally drafted the Interim Exemption so as to exclude the Japanese driftnet fleet and reauthorized the prohibitions in the MMPA in their existing form.

Where Congress has already considered and passed legislation based upon the court of appeals' judicial interpretation in the very case for which the Solicitor General seeks certiorari, this Court's further review is not warranted. By its actions, Congress has ratified the interpretation in the *Kokechik* decision as it applies to the Japanese driftnet fleet and certiorari should be denied.

Congress' recent action also completely disposes of the Solicitor's argument that the court of appeals ruling makes the MMPA an unworkable statute with ramifications for other United States and foreign commercial fisheries operating within

the 200-mile zone. The law may be strict, but Congress has not hesitated to step in and amend the Act, as it did in this case, to create a special exemption to deal specifically with the problem of commercial fisheries/marine mammal interactions. With the enactment of the Interim Exemption in the 1988 MMPA Amendments, all affected fisheries other than the Japanese driftnet fleet will be able to continue operating, even though they may take depleted marine mammal species or species for which OSP has not been determined. 1988 MMPA Amendments § 114(a). (Resp. App. 2a). Therefore, the Solicitor's arguments regarding the potential implications of this case for other United States and foreign fisheries as a reason for granting a writ of certiorari have been answered by Congress and no longer provide any valid grounds for this Court's review.

Finally, the asserted risk to foreign relations is not supported by the facts and is not grounds for certiorari. The INPFC is in no way threatened by upholding the requirements of the MMPA as they apply to the Federation driftnet fleet, since Japan agreed as part of the INPFC amendments of 1978 that the Federation would not be allowed to operate within the United States 200-mile zone if it was not in full compliance with the MMPA. INPFC Art. X and 1978 Annex, 30 U.S.T. 1095, T.I.A.S. No. 9242. The Federation may still operate in a designated area outside the 200-mile zone under the INPFC and, in fact, it did operate there successfully during the 1988 fishing season without breaching the INPFC. *See* Respondents Center for Environmental Education's Opposition to Application for Stay Pending Filing and Disposition of Writs of Certiorari at 3-5 (filed June 6, 1988). Moreover, to the extent that foreign relations have any bearing on this case, Congress has considered them in the recent amendments to the MMPA, and this Court should not attempt to second guess Congress. *See* 1988 House Report at 21; 1988 Senate Report at 16.

Nor is there any threat to this nation's international fisheries agreements with the Soviet Union, as alleged in the Solicitor General's petition. The comprehensive fisheries agreement alluded to in the Solicitor's petition was signed on May 31, 1988, and approved by Congress on September 26th. *See* 134 Cong. Rec. H2486 (daily ed. September 26, 1988). Any Soviet fisheries which might seek permission to operate within the United States' 200-mile zone under the agreement would qualify for an Interim Exemption under the 1988 MMPA Amendments the same as any other fishery, except for the Federation, and thus will be permitted to operate, notwithstanding the *Kokechik* decision.

In sum, with Congress' recent action, there is no reason for this Court to exercise its review powers in this case and certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied in this case.

Respectfully submitted,

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December 9, 1988

# APPENDIX A

**H.R. 4189** **PUBLIC LAW 100-711**

***One Hundredth Congress of the United States of America***

**AT THE SECOND SESSION**

***Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eighty-eight***

**An Act**

To authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Section 1. That this Act may be cited as the "Marine Mammal Protection Act Amendments of 1988".

INTERIM COMMERCIAL FISHERY EXEMPTION

Sec. 2.(a) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) is amended —

(1) by redesignating section 114 as section 116; and

(2) by inserting immediately after section 113 the following new section:

## "INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

"Sec. 114. (a)(1) During the period beginning on the date of enactment of this section and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

"(2) The provisions of this section other than subsection (e)(6)(A) shall not govern the incidental taking of marine mammals in the course of commercial yellowfin tuna fishing subject to section 104(h)(2) of this title.

"(b)(1) The Secretary shall, after consultation with the Marine Mammal Commission —

> "(A) publish in the Federal Register, for public comment, not later than sixty days after the date of enactment of this section a proposed list of those fisheries, along with a statement of the marine mammals and the approximate number of vessels or persons involved in each such fishery, that have —
>
> "(i) frequent incidental taking of marine mammals;
>
> "(ii) occasional incidental taking of marine mammals; or

(iii) a remote likelihood of or no known incidental taking of marine mammals;

"(B) publish in the Federal Register not later than one hundred and twenty days after the date of enactment of this section a final list of the fisheries and other information required by paragraph (A), together with a summary of the provisions of this section and information sufficient to advise vessel owners on how to obtain an exemption and otherwise comply with the requirements of this section; and

"(C) at least once each year thereafter, and at such other times as the Secretary considers appropriate, reexamine, based on information gathered from the program established under subsections (c), (d), (e), and (f), and other relevant sources and after notice and opportunity for public comment, the classification of fisheries and other determinations required under subparagraph (A) and publish in the Federal Register any necessary changes.

"(2)(A) An exemption shall be granted by the Secretary in accordance with this section for a vessel engaged in a fishery identified under paragraph (1)(A)(i) or (ii), upon receipt by the Secretary of a completed registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary considers necessary. A decal or other physical evidence that the exemption is current and valid shall be granted, and so long as the exemption remains current and valid, shall be reissued annually thereafter.

"(B) No exemption may be granted under this section to the owner of a vessel unless such vessel —

"(i) is a vessel of the United States; or

"(ii) has a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

"(C) Notwithstanding any other provision of this title, exemptions granted under this section shall authorize the incidental taking of marine mammals, other than California sea otters, from any species or stock, including a population stock designated as depleted, but shall not authorize the intentional lethal taking of any Steller sea lion, any cetacean, or any marine mammals from a population stock designated as depleted.

"(3)(A) Beginning two hundred and forty days after the date of enactment of this section, each owner of a vessel engaged in any fishery identified under paragraph (1)(A)(i) or (ii) shall, in order to engage lawfully in that fishery —

"(i) have registered with the Secretary in order to obtain for each such vessel owned an exemption for the purpose of incidentally taking marine mammals in accordance with this section;

"(ii) ensure that a decal or such other physical evidence of a current and valid exemption as the Secretary may require is displayed on or is in the possession of the master of each such vessel; and

"(iii) report as required by subsection (c).

"(B) Any owner of a vessel receiving an exemption under this section for any fishery identified under paragraph (1)(A)(i) shall, as a condition of that exemption, take on board a natural resource observer if requested to do so by the Secretary.

"(C) An owner of a vessel engaged in a fishery identified under paragraph (1)(A((i) or (ii) who —

"(i) fails to obtain from the Secretary an exemption under this section;

"(ii) fails to maintain a current and valid exemption; or

"(iii) fails to ensure that a decal or other physical evidence of such exemption issued by the Secretary is displayed on or is in possession of the master of the vessel,

and the master of any such vessel engaged in such fishery, shall be deemed to have violated this title, and shall be subject to the penalties of this title except in the case of unknowing violations before January 1, 1990.

"(D) If the owner of a vessel has obtained and maintains a current and valid exemption from the Secretary under this section and meets the requirements set forth in this section, the owner of such vessel, and the master and new members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the exemption applies.

"(E) Each owner of a vessel engaged in any fishery not identified in paragraph (1)A)(i) or (ii), and the master and crew members of such a vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals if such owner reports to the Secretary, in such form and manner as the Secretary may require, instances of lethal incidental taking in the course of that fishery.

"(4) The Secretary shall suspend or revoke an exemption granted under this section and shall not issue a decal or other physical evidence of the exemption for any vessel until the owner of such vessel complies with the reporting requirements

under subsection (c) and such requirements to take on board a natural resource observer under paragraph (3)(B) as are applicable to such vessel.

"(5)(A) The Secretary shall develop, in consultation with the appropriate States, Regional Fishery Management Councils, and other interested parties, the means by which the granting and administration of exemptions under this section shall be integrated and coordinated, to the maximum extent practicable, with existing fishery licenses, registrations, and related programs.

"(B) The Secretary shall utilize newspapers of general circulation, fishery trade associations, electronic media, and other means of advising commercial fishermen of the provisions of this section and the means by which they can comply with its requirements.

"(C) The Secretary is authorized to charge a fee for the granting of an exemption under this subsection. The level of fees charged under this subparagraph shall not exceed the administrative costs incurred in granting an exemption. Fees collected under this subparagraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of exemptions under this section.

"(c) The owner of each vessel holding an exemption granted under subsection (b) of this section shall regularly compile information which shall be used in a report to be submitted to the Secretary at the close of the fishing season or annually, as the Secretary may prescribe. Such report shall be submitted in such form as the Secretary may require and shall include the following:

"(1) the type of fishery engaged in by the owner's vessel;

"(2) the date and approximate time of any incidental taking of a marine mammal, together with the area in which the incidental taking occurred, the fishing gear used at the time of the incidental taking, and the species of fish involved; and

"(3) for each incidental taking, the number and species of marine mammals involved, whether the marine mammals were deterred from gear or catch, incidentally injured, incidentally killed, or lethally removed to protect gear, catch, or human life.

If there was no incidental taking of marine mammals during the reporting period, a report stating that fact shall be filed with the Secretary.

"(d)(1) The Secretary shall establish a program to enhance the quality of and verify information received from reports submitted by owners of vessels who have been granted an exemption under subsection (b) of this section. The program shall include, but not be limited to —

"(A) education efforts regarding the information that must be submitted;

"(B) interviews with fishermen; and

"(C) other such information gathering and verification activities that will enable the Secretary to determine reliably the nature, type, and extent of the incidental taking of marine mammals that occurs in a fishery.

Except to the extent authorized by the provisions of subsection (e), the program shall not include placement of observers aboard exempted vessels.

"(2) Information obtained under this subsection shall be subject to the confidentiality provisions of subsection (j).

"(e)(1) For each fishery identified under subsection (b)(1)(A)(i) of this section, the Secretary shall, after consultation with the appropriate Regional Fishery Management Councils, other Federal and State agencies, and other interested parties, and subject to paragraph (6), place observers on board exempted vessels so as to monitor not less than 20 percent nor more than 35 percent of the fishing operations by vessels in the fishery to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery. If the Secretary determines that fewer than 20 percent of the fishing operations by vessels in the fishery will be monitored during the course of the fishing season, the Secretary shall implement the alternative observation program described in subsection (f) to the extent necessary to supplement the observer program described in this subsection.

"(2) When determining the distribution of observers among fisheries and between vessels in a particular fishery, the Secretary shall be guided by the following standards:

"(A) the requirement to obtain the best scientific information available;

"(B) the requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

"(C) consistent with paragraph (1), the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and

"(D) where practicable, the need to minimize costs and avoid duplication.

"(3) If the Secretary finds that, for reasons beyond his or her control, the Secretary cannot assign observers to all the fisheries identified under subsection (b(1)(A)(i) of this section at the level of observer coverage set forth in paragraph (1), the Secretary shall allocate available observers among such fisheries, consistent with paragraph (2), according to the following priority:

> "(A) those fisheries that incidentally take marine mammals from any population stock designated as depleted;
>
> "(B) those fisheries that incidentally take marine mammals from population stocks that the Secretary believes are declining;
>
> "(C) those fisheries other than those described in subparagraphs (A) and (B) in which the greatest incidental take of marine mammals occur, and
>
> "(D) any other fishery identified under subsection (b)(1(A)(i).

The Secretary may, with the consent of the vessel owner, station an observer on board a vessel engaged in a fishery not identified under subsection (b)(1)(A)(i).

"(4) Information gathered by observers shall be subject to the provisions of subsection (j). Consistent with the requirements of paragraph (1), the Secretary shall, if requested by the Appropriate Regional Fishery Management Council, or in the case of a State fishery, the State, require observers to collect additional information, including but not limited to the quantities, species, and physical condition of target and non-target fishery resources and, if requested by the Secretary of the Interior, seabirds.

"(5) Notwithstanding the provisions of paragraph (4), the Secretary may decline to require observers to collect information described in such paragraph, if the Secretary finds in writing, following public notice and opportunity for comment, that such opportunity will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resources and seabirds.

"(6) The Secretary shall not be required to place an observer on a vessel in a fishery if the Secretary finds that —

> "(A) in a situation where harvesting vessels are delivering fish to a processing vessel and the catch is not taken on board the harvesting vessel, statistically reliable informtaion can be obtained from an observer on board the processing vessel to which the fish are delivered;
>
> "(B) the facilities of a vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; or
>
> "(C) for reasons beyond the control of the Secretary, an observer is not available.

"(7)(A) An observer on a vessel (or the observer's personal representative) under the requirements of this section or section 104 that is ill, disabled, injured, or killed from service as an observer on that vessel may not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct.

"(B( This paragraph does not apply if the observer is engaged by the owner, master, or individual in charge of a

vessel to perform any duties in service to the vessel.

"(8) There are authorized to be appropriated to the Department of Commerce for the purposes of carrying out this subsection not to exceed $2,700,000 for fiscal year 1989 and not to exceed $8,000,000 for each of the fiscal years 1990, 1991, 1992, and 1993.

"(f)(1) The Secretary shall establish an alternative observation program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries identified pursuant to subsection (b)(1)(A)(i) of this section for which the required level of observer coverage has not been met or for any other fisheries about which such reliable information is not otherwise available. The alternative program shall include, but not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

"(2) Individuals engaged in the alternative observation program shall collect scientific information on the fisheries subject to observation, consistent with the requirements of paragraph (1) and subsection (e)(4) and (5). All information collected shall be subject to the provisions of subsection (j).

"(g)(1) The Secretary shall review information regarding the incidental taking of marine mammals and evaluate the effects of such incidental taking on the affected population stocks of marine mammals.

"(2) If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f), that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate

Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph—

"(A) shall, to the maximum extent practicable, avoid interfering with existing State or regional fishery management plans;

"(B) shall be published in the Federal Register together with the reasons therefor;

"(C) shall remain in effect for not more than one hundred and eighty days or until the end of the fishing season, whichever is earlier; and

"(D) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines the reasons for the emergency regulations no longer exist.

In prescribing emergency regulations under this paragraph, the Secretary shall take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals.

"(3) If the Secretary finds, based on information received from the programs established under subsections (c), (d), (e), and (f), that incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population stock but that it will likely have a significant adverse impact over a period of time longer than one year, the Secretary shall request the appropriate Regional Fishery Management Council or State to initiate, recommend, or take such action within its authority as it considers necessary to mitigate the adverse impacts, including adjustments to requirements on fishing times or areas or the imposition of restrictions on the use of vessels or gear.

"(4) The Secretary shall impose appropriate conditions and restrictions on an exemption granted under subsection (b) if—

"(A) a Regional Fishery Management Council or State does not act in a reasonable period of time on a request made by the Secretary under paragraph (3); or

"(B) if the Secretary determines after notice and opportunity for public comment that the purposes of this section would be better served by such action.

"(h) The Secretary shall design and implement an information management system capable of processing and analyzing reports received from the programs established under subsections (c), (d), (e), and (f), and other relevant sources, including Federal and State enforcement authorities, marine mammal stranding networks, and the marine mammal researchers. The information shall be made accessible to the public on a continuing basis, but in any case no later than six months after it is received, subject to the provisions of subsection (j).

"(i) When carrying out the Secretary's responsibilities under subsections (b), (d), (e), (f) and (h) of this section, the Secretary shall, to the maximum extent practicable, utilize the services and programs of State agencies, Federal agencies (including programs established by Regional Fishery Management Councils), marine fisheries commissions, universities, and private entities, on a reimbursable basis or otherwise. The Secretary is authorized to enter into contracts and agreements to carry out his or her responsibilities and shall establish appropriate guidelines to ensure that other programs used or contracted for will meet the same standards as a program established by the Secretary. A person contracting with the Secretary to provide observer services under subsection (e) of this section must provide evidence of financial responsibility in an amount and form prescribed by the Secretary to com-

pensate employees (or their survivors) adequately for any illness, disability, injury, or death from service on a vessel.

"(j)(1) Any information collected under subsection (c), (d), (e), (f), or (h) of this section shall be confidential and shall not be disclosed except—

"(A) to Federal employees whose duties require access to such information;

"(B) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

"(C) when required by court order; or

"(D) in the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

"(2) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

"(k) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as necessary and appropriate to carry out the purposes of this section.

"(l)(1) The Chairman of the Marine Mammal Commission shall, after consultation with interested parties and not later than February 1, 1990, transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section

104(h)(2), after October 1, 1993. Such guidelines shall be developed by the Commission and its Committee of Scientific Advisers on Marine Mammals and shall—

"(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1933;

"(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and

"(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking—

"(i) the status and trends of the affected marine mammal population stocks;

"(ii) the abundance and annual net recruitment of such stocks;

"(iii) the level of confidence in the knowledge of the affected stocks; and

"(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.

"(2) The Secretary shall advise the Chairman of the Commission in writing if the Secretary determines that any additional information or explanation of the Chairman's recommendations is needed, and the Chairman shall respond in writing to any such request by the Secretary.

"(3) On or before February 1, 1991, the Secretary, after consultation with the Marine Mammal Commission, Regional Fishery Management Councils, and other interested govern-

mental and non-governmental organizations, shall publish in the Federal Register, for public comment, the suggested regime that the Secretary considers should, if authorized by enactment of any additional legislation, govern incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The suggested regime shall include—

"A) the scientific guidelines to be used in determining permissible levels of incidental taking;

"(B) a description of the arrangements for consultation and cooperation with other Federal agencies, the appropriate Regional Fishery Management Councils and States, the commercial fishing industry, and conservation organizations; and

"(C) a summary of such regulations and legislation as would be necessary to implement the suggested regime.

"(4) On or before January 1, 1992, the Secretary, after consultation with the Marine Mammal Commission, and consideration of public comment, shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives recommendations pertaining to the incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The recommendations shall include—

"A) the suggested regime developed under paragraph (3) of this subsection as modified after comment and consultations;

"(B) a proposed schedule for implementing the suggested regime; and

"(C) such recommendations for additional legislation as the Secretary considers necessary or desirable to implement the suggested regime.

"(m) The Secretary shall consult with the Secretary of the Interior prior to taking actions or making determinations under this section that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under this title.

"(n) For the purposes of this section, the owner of fixed or other commercial fishing gear that is deployed with or without the use of a vessel shall be deemed to be an owner of a vessel engaged in the fishery in which that gear is deployed.

"(o) As used in this section—

"(1) the term 'fishery' has the same meaning as it does in section 3(8) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(8)).

"(2) the term 'Secretary' means the Secretary of Commerce.

"(3) the term 'vessel engaged in a fishery' means a fishing vessel as defined in section 2101(11a) of title 46, United States Code, or a fish processing vessel as defined in section 2101(11b) of that title, which is engaged in fishery.

"(4) the term 'vessel of the United States' has the same meaning as it does in section 3(27) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(27))."

(b) Section 102(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(a) is amended by striking "and 113" and inserting in lieu thereof the following: "113, and 114".

(c) The table of contents contained in the first section of the Marine Mammal Protection Act of 1972 is amended by striking:

"Sect. 114. Authorization of Appropriations."

and inserting in lieu thereof the following:

"Sec. 114. Interim Exemption for Commercial Fisheries.
"Sec. 115. Status Review; Conservation Plans.
"Sec. 116. Authorization of Appropriations.".

## STATUS REVIEW

Sec. 3. (a) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) is amended by inserting immediately after section 114, as added by section 2 of this Act, the following new section:

"STATUS REVIEW; CONSERVATION PLANS

"Sec. 115. (a)(1) In any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted, regardless of whether such action is taken on the initiative of the Secretary or in response to a petition for a status review, the Secretary shall only make such a determination by issuance of a rule, after notice and opportunity for public comment and after a call for information in accordance with paragraph (2).

"(2) The Secretary shall make any determination described in paragraph (1) solely on the basis of the best scientific information available. Prior to the issuance of a proposed rule concerning any such determination, the Secretary shall publish in the Federal Register a call to assist the Secretary in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in any industry which might be affected by the deter-

mination, and from academic institutions. In addition, the Secretary shall utilize, to the extent the Secretary determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

"(3)(A) If the Secretary receives a petition for a status review as described in paragraph (1), the Secretary shall publish a notice in the Federal Register that such a petition has been received and is available for public review.

"(B) Within sixty days after receipt of the petition, the Secretary shall publish a finding in the Federal Register as to whether the petition presents substantial information indicating that the petitioned action may be warranted.

"C) If the Secretary makes a positive finding under subparagraph (B), the Secretary shall include in the Federal Register notice, a finding that—

> "(i) a review of the status of the species or stock will be commenced promptly; or
>
> "(ii) a prompt review of the petition is precluded by other pending status determination petitions and that expeditious progress is being made to process pending status determination petitions under this title.

In no case after making a finding under this subparagraph shall the Secretary delay commencing a review of the status of a species or stock for more than one hundred and twenty days after receipt of the petition.

"(D) No later than two hundred and ten days after the receipt of the petition, the Secretary shall publish in the Federal Register a proposed rule as to the status of the species or stock, along with the reasons underlying the proposed status determination. Persons shall have at least sixty days to submit comments on such a proposed rule.

"(E) Not later than ninety days after the close of the comment period on a proposed rule issued under subparagraph (D), the Secretary shall issue a final rule on the status of the species or stock involved, along with the reasons for the status determination. If the Secretary finds with respect to such a proposed rule that there is substantial disagreement regarding the sufficiency or accuracy of the available information relevant to a status determination, the Secretary may delay the issuance of a final rule for a period of not more than six months for purposes of soliciting additional information.

"(F) Notwithstanding subparagraphs (D) and (E) of this paragraph and section 553 of title 5, United States Code, the Secretary may issue a final rule as to the status of a species or stock any time sixty or more days after a positive finding under subparagraph (B) if the Secretary determines there is substantial information available to warrant such final status determination and further delay would pose a significant risk to the well-being of any species or stock. Along with the final rule, the Secretary shall publish in the Federal Register detailed reasons for the expedited determination.

"(b)(1) The Secretary shall prepare conservation plans—

"(A) By December 31, 1989, for North Pacific fur seals;

"(B) by December 31, 1990, for Steller sea lions; and

"(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

"(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery

plans required under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)).

"(3) The Secretary shall act expeditiously to implement each conservation plan prepared under paragraph (1). Each year, the Secretary shall specify in the annual report prepared under section 103(f) of this title what measures have been taken to prepare and implement such plans.".

## TAKING OF PORPOISE IN TUNA FISHERY

Sec. 4. (a) Section 101(a)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(2)) is amended—

(1) in subparagraph (a), by striking "and" at the end;

(2) in subparagraph (B)—

(A) in clause (ii), by striking the period at the end and inserting in lieu thereof a comma; and

(B) by adding at the end, flush with the margin, the following:

"except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless—

"(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

"(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0

times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

"(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

"(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

"(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h)(3) of this title;" and

(3) by adding at the end othe following new subparagraphs:

"(C) shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to thé United States; and

"(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect."
(b) Paragraph (2) of section 108(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1378(a)) is amended to read as follows:

"(2) initiate—

"(A) negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species or population stock of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals, with the Secretary of State to pre-

pare a draft agenda relating to this matter for discussion at appropriate international meetings and forums; and

"(B) discussions with foreign governments whose vessels harvest yellowfin tuna with purse seines in the eastern tropical Pacific Ocean, for the purpose of concluding, through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions as may be appropriate, international arrangements for the conservation of marine mammals taken incidentally in the course of harvesting such tuna, which should include provisions for (1) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate;".

(c) Section 108 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1378) is amended by adding at the end the following new subsection:

"(c) The Secretary shall include a description of the annual results of discussions initiated and conducted pursuant to subsection (a)(2)(B), as well as any proposals for further action to achieve the purposes of that subsection, in the report required under section 103(f) of this title.".

(d) Section 104(h)(2)(B) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1374(h)(2)(B)) is amended by adding at the end the following new clauses:

"(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for—

"(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

"(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all certificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

"(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations,

and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

"(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

"(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary

determines based on a study which the Secretary shall undertake, that the use of such device does not result in physical impairment or increased mortality of marine mammals.

"(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-American Tropical Tuna Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

"(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested persons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals under this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of

alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.''.

(e) Section 110(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1380(a)) is amended—

(1) immediately before ''The Secretary'' at the beginning of the first sentence, by inserting ''(1)''; and

(2) by adding at the end the following new paragraph:

''(2) For purposes of identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals, the Secretary shall contract for an independent review of information pertaining to such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical, or other expertise that may be relevant to the identification of promising alternative fishing techniques. The Secretary shall request that the independent review be submitted to the Secretary on or before September 8, 1989, and the Secretary shall submit the report of the independent review, together with a proposed plan for research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on or before December 5, 1989.''.

## SCIENTIFIC RESEARCH AND PUBLIC DISPLAY PERMITS

Sec. 5. (a) Section 109(h) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1379(h)) is amended to read as follows:

"(h)(1) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

"(A) the protection or welfare of the mammal,

"(B) the protection of the public health and welfare, or

"(C) the nonlethaal removal of nuisance animals.

"(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) from importing a marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

"(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.".

(b) Section 102(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(b)) is amended by adding at the end the following new sentence, flush with the margin:

"Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal.".

(c) Paragraph (1) of section 101(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)) is amended to read as follows:

"(1) Consistent with the provisions of section 104, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if—".

(d) Section 104(c) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1374(c)) is amended—

(1) by striking "display or scientific research" each place it appears and inserting in lieu thereof the following: "scientific research, public display, or enhancing the survival or recovery of a species or stock";

(2) by inserting "(1)" immediately after "(c)"; and

(3) by adding at the end the following new paragraphs:

"(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

"(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves

the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

"(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

"(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

"(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

"(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary—

"(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

"(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

"(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.".

(e)(1) Section 101(a)(3)(B) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(3)(B)) is amended by inserting, immediately after "scientific research purposes", the following: "or enhancing the survival or recovery of a species or stock".

(2) Section 102(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1372(b)) is amended by striking "research" and inserting in lieu thereof the following: "research, or for enhancing the survival or recovery of a species or stock.".

(3) Section 109(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1379(b)) is amended—

(A) in paragraph (1)(E), by striking "research and public display purposes" and inserting in lieu thereof the following: "research, public display, or enhancing the survival or recovery of a species or stock"; and

(B) in paragraph (3)(B)(ii), by striking "research or public display purposes" and inserting in lieu thereof the

following: "research, public display, or enhancing the survival or recovery of a species or stock".

(4) Section 202(a)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1402(a)(2)) is amended by inserting, immediately after "scientific research", the following: ", public display, or enhancing the survival or recovery of a species or stock".

## AUTHORIZATION OF APPROPRIATIONS

Sec. 6. Section 7 of the Act entitled "An Act to improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes", approved October 9, 1981 (16 U.S.C. 1384 and 1407) is amended—

(1) in subsection (a), by adding at the end the following new sentence: "There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under such title (other than section 114(e)(8)), $12,250,000 for fiscal year 1989, $12,740,000 for fiscal year 1990, $13,250,000 for fiscal year 1991, $13,780,00 for fiscal year 1992, and $14,331,000 for fiscal year 1993.";

(2) in subsection (b)—

(A) by striking "and" immediately after "1985,"; and

(B) by striking "and 1988" and inserting in lieu thereof the following: "1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993"; and

(3) in subsection (c)—

(A) by striking "and" immediately after "1983,"; and

(b) by striking "and 1988" and inserting in lieu thereof the following: "1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993".

STUDY ON MORTALITY OF ATLANTIC DOLPHIN

Sec. 7. (a) The Secretary of Commerce shall conduct a study regarding the east coast epidemic during 1987 and 1988 which has caused substantial mortality within the North Atlantic coastal population of Atlantic bottle-nosed dolphin. The study shall examine—

(1) the cause or causes of the epidemic:

(2) the effect of the epidemic on coastal and offshore populations of Atlantic bottle-nosed dolphin;

(3) the extent to which pollution may have contributed to the epidemic:

(4) whether other species and populations of marine mammals were affected by those factors which contributed to the epidemic; and

(5) any other matters pertaining to the causes and effects of the epidemic.

(b) On or before January 1, 1989, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a plan for conducting the study required in subsection (a).

## AMENDMENTS TO FISHERMEN'S PROTECTIVE ACT OF 1967

Sec. 8. Section 8(h)(4) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(h)(4)) is amended to read as follows:

> "(4) The term "fish products" means any aquatic species (including marine mammals and plants) and all products thereof exported from an offending country, whether or not taken by fishing vessels of such country, or packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof."

## PRIBILOF ISLAND TRUST FUNDS

Sec. 9. Section 206(e)(1) of the Fur Seal Act of 1966 (16 U.S.C. 1166(e)(1)) is amended by adding at the end the following new sentence: "In addition, there are authorized to be appropriated to the Secretary $3,200,000 for fiscal year 1989 and $1,800,000 for fiscal year 1990 to be used for the purpose of funding the Saint Paul Island Trust, as established pursuant to subsection (a)(1) of this section, and $3,700,000 for fiscal year 1990 to be used for the purpose of funding the Saint George Trust, as established pursuant to subsection (a)(1).".

*Speaker of the House of Representatives.*

*Vice President of the United States and President of the Senate.*